(232) AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition No. 1445 of 2006

PETITIONER: Smt. Dashoda Bai

Versus

RESPONDENTS: Shail Kumari & others

JUDGMENT

Madhu 26/3/07.

noted Sunder

Abhishek

Post for : 26.03.2007

Sd/-
Sunil Kumar Sinha
Judge

(233) AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition No. 1445 of 2006

PETITIONER: Smt. Dashoda Bai, wife of Shri Baldau Prajapati, aged about 50 years, resident of Village Chhatan, Tehsil Mungeli, District Bilaspur (C.G.)

Versus

RESPONDENTS:

1. Shail Kumari, wife of Shri Pawan Kumar Yadav, Adult.
2. Kiran Bai, wife of Bhisham Kumar Sonker, Adult.
3. Godawari Bai, wife of Doojram Sahu, Adult.
4. Dehrin Bai, wife of Chaitram Sapre, Adult.
5. Parvati, Bai, wife of Holiram Sahu, Adult.
6. Leela Bai, wife of Feruram Sahu, Adult.
7. Sadhna Bai, wife of Balram Sonker, Adult.

   All residents of Village Chhatan, Tehsil Mungeli, District Bilaspur.
8. The Returning Officer (Shri L.S. Dhruv), Booth No. 129, Gram Panchayat Chhatan, presently working as Professor, Government Higher Secondary School, Lormi, Tehsil & District Bilaspur.
9. The Sub Divisional Officer (Revenue), Mungeli, District Bilaspur.

Appearance:

Shri B.P. Sharma, counsel for the petitioner.

Shri Sanjay K. Agrawal, counsel for respondent No.1. (Sr & Azad Siddiqui Jr)

Shri M.K. Bhaduri and Praven Kumar Tulsyan, counsel for respondents No. 2 & 6.

Shri V.K. Shrivastava, counsel for respondents No. 3, 4, 5 & 7.

Shri M.K. Baig, counsel for respondent No. 8.

Shri Arun Sao, Govt. Advocate for the State/respondent No.9.

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JUDGMENT
(26-03.2007)

SUNIL KUMAR SINHA, J.

(1) Initially, the petition was filed for quashment of the order dated 10.3.2006 (Annexure P-1) passed by the Specified Officer (Sub-Divisional Officer), Mungeli in Election Peititon No.62-A/89(21)/04-05 whereby the said authority, after allowing the election petition filed by respondent no.1 (one of the defeated candidates) ordered for recount of the votes cast in Polling Booth No.129 pertaining to the election of Sarpanch of Gram Panchayat Chhatan, Block and Tahsil Mungeli, Distt. Bilaspur (C.G). Later on when the recount was also done in compliance of the said order and the respondent no.1 was declared elected in place of the petitioner by order dated 20.3.2006 (Annexure P-7/R-1(2) as a result of securing more number of votes than the petitioner, the said order was also challenged by incorporating an amendment in the writ petition.

(2) The brief facts are that the petitioner and respondents no.1 to 7 were the candidates for election to the post of Sarpanch of the aforesaid Gram Panchayat. The polling was conducted on 20.1.2005. In the said election, the petitioner was declared elected by margin of one vote. After such declaration, respondent no.1 filed an election petition u/s 122 of the M.P(C.G) Panchayat Raj Adhiniyam 1994 praying for a recount interalia pleading that there was no sufficient light at the place of counting and the situation was tense as there were no sufficient strength of security force and for all these reasons, looking to the situation, the Presiding Officer any how completed the counting without even proper scrutiny of the ballot papers and even the valid ballot papers through which the

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votes were cast in favour of the respondent no.1 were cancelled by him. Respondent no.1 further pleads that most of the votes which were cancelled by the Presiding Officer were the votes polled in her favour. She also makes allegations that when they tried to give an application for recount, the Presiding Officer did not accept the same and advised them to file an application before Tahsildar at Mungeli. Thereafter, on the next date i.e. 21.1.2005 an application for recount was filed before Assistant Returning Officer, Mungeli who told that the recount is done at the counting place alone and no action was taken on her application. By over-all pleading, the election petitioner expressed her confidence that if the recount is done, she would certainly win the election. A reply to the said election petition was filed by respondent no.1 in which she denied all above contentions. She specifically pleaded that the facts mentioned in the election petition are not true and the election petition deserves to be dismissed.

(3) During the course of evidence, the election petitioner examined herself as P.W.1 and another witness namely Moti Ram Yadav (P.W.2), whereas, the petitioner herein examined 3 witnesses namely Sobhram sahu (D.W.1), Raju s/o Ganesh (D.W.2) and Komal Prasad Sahu (D.W.3). The Presiding Officer was also examined. After completion of the hearing, the election petitioner was allowed and ultimately the impugned order dated 10.3.2006 (Annexure P-1) for recounting was passed, which is under challenge in this petition. The Tribunal allowed the petition mainly on the report dated 14.3.2005 submitted by the Presiding Officer before it holding that according to the said report, there was no sufficient light arrangement at the place of counting and the situation at the Polling

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Booth was tense, due to which, proper scrutiny of ballot papers were not done and also that the margin of votes was only one.

(4) Learned counsel for the petitioner argued that the order for recount was passed without any proper foundation being laid down by the election petitioner and further that the same was not substantiated by the cogent and reliable, oral and/or documentary evidence. He submitted that the report of the Presiding Officer itself shows that a recount was done by him, through without taking application from the other side, and the results were declared and further that the conduct of the Presiding Officer supporting the case of respondent no.1 by filing such a report appears to be collusive. Therefore, the order mainly based on such report deserves to be set aside. His over all submission was that the secrecy of ballot is a sacrosanct principal which cannot be lightly or hastily broken unless there is genuine need for it, recount cannot be ordered without recording definite finding for its necessity according to the Law. In the present case, on the superficial pleadings and evidence, the recount has been ordered by the Tribunal even without seeing that the election petitioner could not establish that she had filed any application for recount before the Presiding Officer.

(5) On the contrary, learned counsel for respondent no.1 argued that the respondent no.1 had laid down proper foundation for recount and had also given an application to the Presiding Officer, but he denied to accept the same and ultimately when the application was given to the Returning Officer, he also denied to take any action on it saying that the application for recount was only acceptable at the place of counting and nothing can be done in his office. His submission was that in light of the recent law laid

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down by the Apex Court, now it is not the requirement of law to firstly file an application for recount before the Presiding Officer at the time of counting for maintaining an election petition. When a proper foundation for recount has been laid down in the election petition, and they have been established by evidence, such frivolous grounds are not available to the writ petitioner and the petition be dismissed.

(6) So far as the requirement of filing of an application for recount before the returning officer under Rule 80 of the M.P. Panchayat Nirvachan Rules (hereinafter referred to as the Rules) is concerned, earlier, the Apex Court held in the matter of ***Smt. Ram Rati –Vs- Saroj Devi, AIR 1997 S.C. 3072*** that unless a party first applies to the Returning Officer for recounting of votes, it is not open to the Tribunal or the Court to direct recounting. It was held that an application for recounting in writing to the Returning Officer was an essential pre-condition for filing election petition on such grounds. Later on, in the matter of ***Sohanlal –Vs- Babu Gandhi and others, AIR 2003 S.C. 320,*** the Apex Court while dealing almost the same points considered the earlier decision of *Smt. Ram Rati's case* (supra) and held that the ratio laid down in the said case is not correct. Considering the provisions of section 43, 195 & 122 of the Act and Rule 80 of the aforesaid Rules, the Apex Court held in this matter that under Sub-Rule (5) of Rule 80, once the result sheet is completed and signed no application for recount can be entertained. It was also held that rule 81 also provides that after recounting of the votes, the Returning Officer shall prepare a return and declare the candidate who has the largest number of votes to have been elected. Under rule 83, a certificate is to be granted to the

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returned candidate who has been declared elected. Under rule 84, after the certificate has been granted, the Election Officer or the Returning Officer can only correct the clerical or arithmetical mistakes. Therefore, after declaration of results, the Returning Officer has no power either to recount or to change the results of the election. Once the result is declared, the only remedy of an aggrieved party is an election petition under section 122 of the Act. Therefore, it was held that it is not correct to hold that in an election petition, after declaration of the result, the Court or Tribunal cannot direct recounting of votes unless the party has applied for recounting of votes before the Returning Officer. There is no prohibition in the Act or under the Rules prohibiting the Court or Tribunal to direct the recounting of votes. Even otherwise a party may not know that the recounting is necessary till after result is declared. At this stage, it would not be possible for him to apply for recounting to the Returning Officer. His only remedy would be to file an election petition u/s 122 and in such cases, the Court or Tribunal is bound to consider the plea and where the case is made out, it may direct recount depending upon the evidence led by the parties.

(7) Therefore it is clear that there was no requirement of law that for filing an election petition for recount, an application for recount must have been made before the Returning Officer at the time of counting of votes under Rule 80 of the aforesaid Rules and the election petition would be maintainable and if the tribunal after considering the plea finds that a case of recount is made out, it may well be directed by the Tribunal by passing an appropriate order depending upon the evidence led by the parties.

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(8) Now the question arises that in what circumstances, the order of recount has to be passed and how the justification of the order can be tested. The Apex Court in the matter of ***Ram Sewak Yadav -Vs- Hussain Kamil Kidwai and others, AIR 1964 S.C. 1249*** held that an order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled :

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

The Apex Court also added a rule of caution while enunciating the above law that an order for inspection for ballot papers cannot be granted to support vague pleas made in the petition not supported by the material facts or fish out evidence to support such pleas. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection.

(9) In the matter of ***D.P. Sharma -Vs- Commissioner and Returning Officer, 1984 (Supp) SCC 157***, the Apex Court laid down that "It is well established that in order to obtain recount of votes a proper foundation is required to be laid by the election petitioner indicating the precise material on the basis of which it could be urged by him with some substance that there has been

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either improper reception of invalid votes in favour of the elected candidate or improper rejection of valid votes in favour of the defeated candidate or wrong counting of votes in favour of the elected candidate which had in reality been cast in favour of the defeated candidate."

(10) In the matter of ***P.K.K. Shamsudeen –Vs- K.A.M. Mappillai Mohindeen and others, (1989) 1 SCC 526,*** the Apex Court further held that "the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interest of justice, a Tribunal or Court should not order the recount of votes."

(11) In the matter of ***P.H. Pujar –Vs- Kanthi Rajashekhar Kidiyappa and others (2002) 3 SCC 742,*** it was held by the Apex Court that the recount of votes cannot be ordered in a casual

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manner. It cannot be ordered because the margin of defeat is meagre. For seeking recount, proper foundation is to be laid in the pleadings by setting out material facts and later proving it by adducing requisite evidence. The recount cannot be ordered on the *ipse dixit* of the election petitioner. It can be ordered in rare cases where specific allegations are made and proved so as to do complete justice between the parties *(See para 14)*. It was also held that the petitioner seeking recount should allege and prove that there was improper acceptance of votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the said allegations can it order recount of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality and irregularity in counting. *(See para 13)*

(12) In the matter of ***Mahendra Pal –vs- Ram Dass Malanger and others (2002) 3 SCC 457*** the Apex Court again held that where no foundation was laid suggesting that there was improper reception of votes in favour of winning candidate or improper rejection of votes which were in favour of the election petitioner nor any objection raised by the election petitioner at the time of counting of votes, the High Court has rightly refused the recounting. The Supreme Court also held that in case there is an application for recount alleging that there are irregularities or illegalities in counting of votes, it is for the applicant to establish his case and in absence of any evidence, the application for recount cannot be allowed.

(13) Recently in the matter of ***Baldev Singh –vs- Shinder Pal Singh and another, (2007) 1 SCC 341,*** the Apex Court has again

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reiterated that the recount of votes should not ordinarily be directed as there exists limitations in this regard. In the said case, the Supreme Court, referred to the decisions rendered in the matter of ***M.Chinnasamy v. K.C. Palanisamy, (2004) 6 SCC 341, T.A. Ahammed Kabeer Vs . A.A. Azez, (2003) 5 SCC 650; Chandrika Prasad Yadav V. State of Bihar, (2004) 6 SCC 331, and Gursewak Singh V. Avtar Singh, (2006) 4 SCC 542 and P.K.K. Shamsudeen's case (Supra).***

(14) If we examine the order of the Tribunal, in light of the above decisions of the Apex Court, it would appear that for the purpose of laying down the foundation for recount, the election petitioner has pleaded vide Para 3 that there was no sufficient arrangement of light at the place of counting and the situation was tense and the Presiding Officer and other officers were under fear. It is also pleaded that there was no arrangement of adequate police force and messages about incidents of *Marpit* , snatching of ballot papers at various other places were coming. It has been further pleaded vide para 4 that in the above situation, the Presiding Officer hurriedly counted the ballot papers and no deep scrutiny of the ballot papers was made by him and most of the ballot papers which were rejected in the scrutiny were in favour of the election petitioner. The oral objection wes made by the counting agent but it was not accepted. The objections were also made by one Tulsiram Sahu and 3-4 other persons specifically named as Gokaran, Ram Khilavan and Ramadhar etc. Vide para 6 it has been pleaded that an application for recount was given by the counting agent of the election petitioner, but it was not entertained and was returned back to him and it was told by the Presiding Officer that they should file such

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application before Tahsildar, Mungeli. These are the only grounds which were pleaded by the respondent no.1 in her election petition and on these grounds only after taking the evidence in the above manner, the order of recount was passed.

(15) To substantiate these grounds, as stated above, only two witnesses were examined by the election petitioner, out of which PW.1, the Election Petitioner, has given a general statement but her election agent (P.W.2) has given an elaborate statement as he was a person through out present. He has stated in examination-in-chief that in the counting hall, there was a bulb and there was also a Petromax. He has stated that the hall was of the size of 50 x 30 ft. and many persons gathered there and after the counting, a prayer for recount was made but it was not accepted and they were advised to give an application before the election officer at Mungeli. In the cross examination, this witness has clearly admitted that process of counting was never affected on account of tense situation. He has further stated that the Petromax was kept at a distance of 2-3 feet from the table where the counting was going on. These factual aspects have been denied by the other side who have said that there was sufficient light in the counting room and in fact no objections pertaining to counting etc., was made. It has been specifically said by Raju (D.W.2) that neither any objection was made by counting agent at the time of counting nor any written application was presented later on. He has stated that the counting was done twice. Likewise, similar statement has been given by Komal Prasad Sahu, (D.W.3) who has stated that at the time of counting, no body has filed either written or oral objection for the same.

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(16) A very important fact of the case is that all the independent witnesses (specifically named in para 4 of the election petition) namely Tulsiram Sahu, Gokaran, Ram Khilavan and Ramadhar were not examined by the election petitioner in support of her contention and the Tribunal has passed the order mainly on the evidence of Presiding Officer who was also examined as an independent witness in this case. The Tribunal has completely lost sight of that part of evidence of Presiding Officer which says that on the request being made by the election petitioner, though he had not accepted the application for recount, but, he had done a recount of votes. The Tribunal has also ignored that very part in which he has admitted that the diary of Presiding Officer was with him which was submitted to the Returning Officer after the election and in the said diary, he has never made entries regarding "insufficient light", "situation of tension" and "counting of votes hurriedly". He has further stated that after the counting, on the next day, he has submitted all these materials in Mungeli and till then there was no dispute. If we examine the validity of these admissions made by the Presiding Officer, one thing clearly emerges that even without accepting an application, there was a recount on the instance of the election petitioner and in the said recount, the result was not varied. The above statement of Presiding Officer clearly supports his report dated 14.3.2005, which was submitted by him to the Election Tribunal in which also it is stated that when the application for recount was being filed, he did not accept the application, however, he had hurriedly made recount and thereafter when he saw dissatisfaction, he advised them to file an application

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before the Returning Officer at Mungeli. This evidence of Returning Officer is certainly suggestive of the facts that :-

(i) there was no tense situation at the time of counting,

(ii) on a request being made from respondents' side he had made a recounting,

(iii) the diary of Presiding Officer was available with him and,

(iv) he had not written anything regarding insufficient light, tense atmosphere and hurriedly doing the work of counting in the Presiding Officer's diary which was available with him.

All these circumstances are suggestive of the fact that the Tribunal did not examine the evidence of the Presiding Officer in proper perspective and has wrongly held that foundation laid for recount was substantiated and a recount, in fact, was necessary in this matter to secure the ends of justice. The Tribunal has ignored the valuable and relevant evidence on the question of necessity of recounting and the foundation of recounting, tried to have been laid down by the election petitioner, was not at all established and I hold it accordingly.

(17) In the result the order dated 10.3.2006 (Annexure P-1) passed by the Election Tribunal deserves to be quashed and is accordingly quashed. So far as the other order dated 20.3.2006 (Annexure P-7/R-1(2) is concerned, when the order of recount itself goes, the said order dated 20.3.2006 does not carry any meaning. As laid down in the case of P.K.K. Shamsudeen (supra) an order of recount of votes must stand or fall on the nature of averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes. Even if the recount

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disclosed that the elected candidate had not secured highest number of votes, the result of the election cannot be disturbed if the order of recount is itself invalid. The factors such as the elected candidate accepted the correctness of the recount, and that he had conceded his defeat and wanted a re-election to be held cannot also constitute justifying materials in law for the initial order of recount of votes made by the Tribunal.

(18) Therefore, the net result is that both the orders passed by the Tribunal i.e. order dated 10.3.2006 and 20.3.2006 are hereby quashed. The petition is allowed. The final result of the election would prevail.

The record of the Tribunal be sent back forthwith.

There shall be no order as to costs.

Sd/-
Sunil Kumar Sinha
Judge

Rao